

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RODERICK BODDIE,

No. C 08-01957 SBA (PR)

Petitioner,

**ORDER GRANTING RESPONDENT'S
MOTION TO DISMISS HABEAS
PETITION AS SECOND OR
SUCCESSIVE**

v.

BEN CURRY, Warden,

(Docket no. 9)

Respondent.

Petitioner, a state prisoner, filed the present pro se petition for writ of habeas corpus.

Before the Court is Respondent's motion to dismiss the petition as a second or successive petition, or, in the alternative, as either barred by Lackawanna County District Attorney v. Coss, 532 U.S. 394 (2001), or untimely under 28 U.S.C. § 2244(d)(1). Petitioner opposes the motion, and Respondent filed a reply to the opposition.

The record shows that Petitioner has filed a previous petition for a writ of habeas corpus with this Court, challenging the same 1997 conviction and sentence. See Case No. C 00-4665 SBA (PR). The Court denied his previous petition on the merits. Petitioner appealed, and the Ninth Circuit Court of Appeals affirmed the judgment on August 4, 2005. (Resp't Ex. 5.) Petitioner then filed a petition for writ of certiorari in the United States Supreme Court, which was denied on February 27, 2006. (Id.)

On April 14, 2008, Petitioner filed the present petition, in which he claims the trial court violated his 1990 plea agreement, because he pled guilty to a "three count single information that was subsequently used by the State as multiple convictions for the purpose of the Three Strikes Law in 1997, thereby breaching the contract." (Pet. at 6.)

DISCUSSION

The Court finds the present petition is a second or successive petition attacking the same 1997 conviction and sentence as Petitioner's prior federal habeas petition. A second or successive petition containing new claims may not be filed in the district court unless Petitioner first obtains

1 from the United States Court of Appeals an order authorizing the district court to consider the
2 petition. 28 U.S.C. § 2244(b)(3)(A). Petitioner has not done so.

3 Furthermore, Petitioner's arguments in opposition to the motion to dismiss are without merit.
4 The Court finds that Petitioner has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C.
5 § 2254 because he is a state prisoner being held "pursuant to the judgment of a State court," 28
6 U.S.C. § 2254, and he is challenging his 1997 conviction on the grounds that his custody is
7 unconstitutional. Petitioner cannot circumvent the bar against second or successive petitions by
8 simply making a conclusory statement that "[t]his petition meets the criteria under section 2254 and
9 is neither second or successive." (Pet. at 6.) Petitioner contends he is not subject to 28 U.S.C.
10 § 2244(b) because the previous federal proceeding did not result in a decision on the merits of the
11 claims presented in the present petition. (*Id.*, Opp'n at 1-2.) A district court must dismiss claims
12 presented in a second or successive habeas petition challenging the same conviction and sentence
13 unless the claims presented in the previous petition were denied for failure to exhaust. *See* 28
14 U.S.C. § 2244(b)(1); *Babbitt v. Woodford*, 177 F.3d 744, 745-46 (9th Cir. 1999). Additionally, a
15 district court must dismiss any new claims raised in a successive petition unless the petitioner
16 received an order from the court of appeals authorizing the district court to consider the petition.
17 *See* 28 U.S.C. § 2244(b)(2), (3). Here, Petitioner has neither showed that the new claims were
18 previously denied for failure to exhaust, nor has he presented an order from the Ninth Circuit Court
19 of Appeals authorizing this Court to consider any new claims.

20 Petitioner also argues that he did not need authorization from the Ninth Circuit because
21 "precedent case law cited in the later [sic] petition did not exist when the first petition was filed."
22 (Opp'n at 2.) Presumably, Petitioner is referring to *Davis v. Woodford*, 446 F.3d 957 (9th Cir.
23 2006). (Pet. at 7.) He also argues that the "events giving rise to the later [sic] application had not
24 occurred until after the conclusion of the earlier habeas proceeding." (Opp'n at 2.) Even if those
25 assertions were true, they would not bestow jurisdiction on this Court to review the current petition
26 without authorization from the Ninth Circuit. *See* 28 U.S.C. § 2244(b)(3)(A). Such authorization is
27 permitted only when the claim relies on a "new rule of constitutional law, made retroactive to cases
28 on collateral review by the Supreme Court, that was previously unavailable," § 2244(b)(2)(A), or

1 "the factual predicate for the claim could not have been discovered previously through the exercise
2 of due diligence," § 2244(b)(2)(B)(i). Davis does not qualify under § 2244(b)(2)(A) because it did
3 not announce a new rule. Nor does § 2244(b)(2)(B)(i) apply, because the factual predicate for the
4 new claim -- that the trial court violated Petitioner's 1990 plea agreement by using those convictions
5 as strikes to enhance the current conviction -- was known to Petitioner at the time of sentencing in
6 1997. Thus, the limitations on second or successive petitions clearly apply, and preclude this Court
7 from addressing the current petition.

8 Accordingly, Respondent's motion to dismiss is GRANTED, and this petition is
9 DISMISSED without prejudice to filing a new habeas action if Petitioner obtains the necessary
10 order.¹

11 CONCLUSION

12 For the foregoing reasons, Respondent's motion to dismiss the petition as a second or
13 successive petition (docket no. 9) is GRANTED. The petition is DISMISSED pursuant to 28 U.S.C.
14 § 2244(b).

15 The Clerk of the Court shall enter judgment in accordance with this Order, terminate all
16 pending motions, and close the file.

17 This Order terminates Docket no. 9.

18 IT IS SO ORDERED.

19 DATED: 12/17/09


20 SAUNDRA BROWN ARMSTRONG
21 UNITED STATES DISTRICT JUDGE
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28 ¹ Because the Court has dismissed the present petition as a successive petition, it need not
address Respondent's two alternative arguments for dismissal.

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

RODERICK BODDIE,
Plaintiff,

v.

BEN CURRY et al,
Defendant.

Case Number: CV08-01957 SBA

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on December 21, 2009, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Roderick Boddie K-58959
California State Prison - Soledad
P.O. Box 689
Soledad, CA 93960-0689

Dated: December 21, 2009

Richard W. Wieking, Clerk
By: LISA R CLARK, Deputy Clerk